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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GERALD SVETANOFF,

Petitioner,

v.

HARRIET L. MCMILLIAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

On what basis is the distinction to be made as to which personnel decisions of a state court judge are protected by absolute judicial immunity and which are not?

PARTIES TO THE PROCEEDING

All present parties are named in the caption. Two defendants, Judge James Danikolas and the Thirty-first Judicial District of Indiana, were dismissed by the District Court.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Gerald Svetanoff respectively prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 10, 1986.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported as *McMillian v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986). The opinion is reproduced starting at page A-1 of the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was issued on June 10, 1986. This Petition for Writ of Certiorari was filed within ninety days of that date in accordance with 28 U.S.C. §2101(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The texts of 42 U.S.C. §§ 1981, 1983, and 2000e(f) are set forth in the Appendix.

STATEMENT OF THE CASE

Plaintiff McMillian, a black female, was the court reporter in the Lake Superior Court, Civil Division, Room Four, sitting in Gary, Indiana. Defendant Svetanoff, the newly appointed Judge of that court, terminated Plaintiff's employment. The dismissal was approved by The Honorable Cordell Pinkerton, the Senior Judge of the Lake Superior Court, pursuant to Indiana statute which provides that court personnel serve at the pleasure of the senior judge. In practice each judge is responsible for the staffing of his or her own courtroom.

Plaintiff McMillian sued Judge Svetanoff, the Honorable James Danikolas (Chief Judge of the Lake Superior Court, Civil Division), and the Thirty-first Judicial District of Indiana in the United States District Court for the Northern District of Indiana, Hammond Division, Cause No. 82-C-590, alleging that the termination of her employment violated her civil rights and constituted unlawful discrimination by race. The defense moved for partial summary judgment as to Plaintiff's damage claims, asserting a defense of absolute judicial immunity. On March 4, 1985, the District Court dismissed the two defendants other than Judge Svetanoff, but denied Judge Svetanoff's motion for partial summary judgment on the issue of damages.

Judge Svetanoff took an immediate appeal of the denial of his absolute immunity defense to the United States Court of Appeals for the Seventh Circuit, which affirmed the District Court on June 10, 1986. Petitioner Svetanoff seeks review on certiorari of the decision of the Court of Appeals.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Court of Appeals in the instant case has held that a state court judge is not immune to liability in damages under 42 U.S.C. § 1983 for firing a court reporter assigned to the judge's courtroom. Just five days earlier, however, in *Forrester v. White*, 792 F.2d 647 (7th Cir. June 5, 1986), *pet. for rehearing pending*, the Court of Appeals held that a state court judge *was* immune to liability in damages for firing a probation officer. The Court of Appeals in the instant case explained the difference by reasoning that the Illinois probation officer in *Forrester*, who advised the court on substantive decision making, was so closely involved with the discretionary decisionmaking processes of the court that the act of firing that officer implicates the very judicial process itself. Appendix, pp. A-5—A-6. *Forrester* noted the danger that a judge might lose confidence in his probation officer but hestitate to fire him because of the threat of litigation. Since he then retains an officer in whom he has no confidence, the quality of his decisionmaking will decline, victimizing the parties appearing before the court. *Forrester*, at 792 F.2d 658. The Court of Appeals in the instant case concluded that the objectives of the judicial immunity doctrine — principled decisionmaking — would not be furthered by "allowing judges to hire and fire court reporters with impunity," and therefore declined to extend immunity to a judge's decision to fire a court

reporter. Appendix A-11. The instant case and *Forrester* together mean that some firing decisions by a judge are immunized from suit, some are not. The distinction is made by an unworkably vague rule depending on an assessment of whether or not the particular job involves participating in the deliberative and decisionmaking processes of the court.

The Court of Appeals decision depends on a hidden, and mistaken, assumption. That assumption is that a judge need only have confidence in the people who advise him on substantive decisionmaking matters in order to be free to make principled decisions, and that he need not have such confidence in employees whose tasks do not involve giving advice and making recommendations to him. Presumably, then, a law clerk would meet the *Forrester/McMillian* test, but a bailiff or secretary would not. The assumption, however, is unfounded.

It is unfounded because a judge's decisionmaking does not rest merely on the advice and recommendations given him by employees who actually participate in his deliberations. A judge's decisionmaking rests equally on the assumption that those employees who provide him with materials necessary to the decisionmaking process have done their job. A judge deliberating an opinion, for instance, assumes that the clerk has put in the file all the pleadings filed by the parties to the case. If the judge has no confidence in the clerk's ability to keep the files — a non-deliberative task — his decisionmaking may well be impaired, since he will mistrust the file on which he relies in reviewing and assessing a case. Similarly, a judge may rely on his secretary or bailiff to inform counsel of hearing times, or to ascertain whether counsel are willing to submit motions for decisions on brief, without hearing, or to inform him which counsel indicate interest in attending and participating in various hearings and arguments (in the not uncommon situation, for instance, of a complex case with multiple parties in which not all parties have a direct interest in all proceedings in the case).

With respect to court reporters, the question of whether or not the judge's decisionmaking ability is implicated by his confidence or lack of confidence in the reporter is easily answered by considering a very simple situation. Suppose the judge is considering a decision and is relying upon a hearing transcript prepared by a court reporter in whom the judge lacks confidence. In such a situation the judge's decisionmaking ability cannot but be adversely affected.

It is important to note that in passing Title VII of the Civil Rights Act of 1964, Congress recognized an exception with regard to elected state officials. 42 U.S.C. § 2000e(f) excepts from the definition of "employee" not only "policy making" employees of such officials, and not only "immediate adviser[s] with respect to the constitutional and legal powers of the office," but also "any person chosen by that officer to be on such officer's personal staff." That is to say, Congress felt that the functioning of these offices required not only immunity as to employees who participated in the official's deliberations, but also as to employees who, even if performing nondeliberative duties, were "personal staff." This case is not a Title VII case: Plaintiff did not assert a Title VII claim in her complaint. Defendant Svetanoff, however, would urge that the statute is persuasive authority for the proposition that Congress itself has recognized that key officials cannot perform their duties without the ability to choose their immediate staffs. Thus, in *Clark v. Tarrant County, Texas*, 608 F.Supp 209 (N.D. Texas 1985), it was held that a probation officer was part of the "personal staff" of a state court judge within the meaning of § 2000e(f). No distinction between employees who assisted the judge in his deliberations and employees who performed nondeliberative functions was drawn.

Defendant Svetanoff is not maintaining that every hiring decision made by a judge should come within the cloak of judicial immunity. *Clark v. Campbell*, 514 F.Supp. 1300 (W.D. Ark. 1981), cited by the Court of Appeals, for instance, dealt with a county employee in charge of

programs for the aged. That employee had nothing to do with the actual functioning of the judge's court, and the case correctly held that no immunity attached to the judge's decisions with respect to hiring and firing for that post. Defendant Svetanoff maintains only that judges must have the ability to choose those persons who actually work within the court, transacting the business of the court. Thus the courthouse janitor is not in the same position as the judge's secretary, bailiff, clerk, law clerk, or reporter, despite the Court of Appeals' remark that the janitor, like the others, assists in "the smooth operation of the judicial process," Appendix A-10. The janitor does not actually transact the business of the Court. The janitor is not assigned to that particular courtroom, but to the building as a whole. The janitor does not perform functions upon which the court relies in the handling of cases.

Aside from the fact that a judge must be able to rely on his courtroom staff with confidence, the court cannot work effectively if the immediate courtroom staff cannot function harmoniously. "Every judge who is actively engaged in the discharge of court functions knows the importance of a cooperative and confidential relationship with staff members. The absence of either cooperation or confidentiality is disruptive and inevitably impairs the operation of any court." *Abbot v. Thetford*, 529 F. 2d 695 (5th Cir. 1976), at 529 F.2d 705 (dissenting opinion, adopted as opinion of the court at 534 F.2d 1101).

Stump v. Sparkman, 435 U.S. 349 (1978) recognized that judges are immune for their judicial acts, but not necessarily for their administrative acts. The Court of Appeals, in the instant case and in *Forrester*, has recognized that some personnel decisions are so intimately bound up with the functioning of the Court as to be immunized from suit. Unfortunately, the Court of Appeals chose to distinguish between employees (such as probation officers) who give discretionary advice to the judge and employees who do not. This distinction is not workable and

will provide little guidance in future cases. The only workable distinction is between those employees who serve on the judge's immediate courtroom staff, transacting the business of the court, and those employees who under state law, for one reason or another, are selected by the judge but do not serve under his immediate supervision, and do not assist in transacting the court's business. Cf. *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206 (E.D. Mo.) 1982, *affirmed on other grounds*, 707 F.2d 1005 (1983) (staff attorney who did not report to judge directly and did not serve in his immediate courtroom); *Goodwin v. Circuit Court*, 729 F. 2d 541 (8th Cir. 1983), *cert. denied*, ____ U.S. ____, 105 S.Ct. 112 (1984) (hearing officer who worked completely independent of judge's supervision and outside his courtroom).

The decision of the Seventh Circuit, therefore, should be reviewed. If the purpose of judicial immunity — the furtherance of principled decisionmaking — is to be achieved, the distinction between immune and non-immune personnel decisions by judges must rest not on a tortuous distinction between deliberative and non-deliberative functions, but between court employees who participate in transacting the court's business and employees chosen by the judge who do not transact the court's business. A writ of *certiorari* should be granted so that this Court may resolve the faulty distinction made by the Court of Appeals' ruling.

CONCLUSION

For the foregoing reasons, Petitioner urges that a writ of *certiorari* should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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Appendix

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1544

HARRIETT L. MCMILLAN,

Plaintiff-Appellee,

v.

GERALD SVETANOFF,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 82 C 590—**Michael S. Kanne**, *Judge.*

ARGUED DECEMBER 6, 1985—DECIDED JUNE 10, 1986

Before CUMMINGS, *Chief Judge*, WOOD and CUDAHY, *Circuit Judges.*

CUMMINGS, *Chief Judge.* The issue in this case is whether a judge's act in firing a court reporter is protected by judicial immunity. The plaintiff, Harriet McMillan, was employed as a court reporter for the Lake County Superior Court from February, 1973, to July 1, 1981. When the defendant, Gerald Svetanoff, was elected and took office as judge he dismissed the entire staff of his courtroom, including McMillan. One employee was rehired.

Indiana Code § 3-5-29.5-8 provides that court personnel serve at the pleasure of the senior judge of each division. In practice each judge employs the staff for his or her own courtroom subject to approval of the senior judge.

Court reporters serve a particular judge, but are occasionally rotated through other chambers and also do work for private attorneys.

McMillan brought suit under 42 U.S.C. §§ 1981 and 1983, alleging violations of her civil rights. Specifically, she claimed she was discharged because of her race (black) and her political affiliation (Democrat). Judge Svetanoff filed a motion for summary judgment as to the damages claims, asserting absolute judicial immunity. The district court denied the motion without a statement of reasons. We affirm.

I

The sole question presented for review is whether the defendant should be shielded from personal liability for his termination of the plaintiff. It is well established that judges are immune from liability for their judicial acts, even when they act maliciously or corruptly. *Stump v. Sparkman*, 435 U.S. 349. The purpose of judicial immunity is to protect the public's interest in an independent judiciary. The doctrine of judicial immunity was initially developed in the context of adversarial proceedings where judges decide controversies between parties. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347. It has since been extended to any "judicial" act performed by a judge and even to other officials acting in a manner closely aligned with the judicial process. *Barr v. Matteo*, 360 U.S. 564; *Butz v. Economou*, 438 U.S. 478; *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668 (7th Cir. 1985), certiorari denied, 106 S. Ct. 884.

The rationale for a doctrine that excludes judges from liability for even intentional and malicious conduct while on the bench is that judges should be free to make controversial decisions and act upon their convictions without fear of personal liability. *Stump*, 435 U.S. at 364. It is the concern for principled and fearless decisionmaking that forms the basis for judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 554. But immunity is only granted when essen-

tial to protect the integrity of the judicial process. *Briscoe v. LaHue*, 460 U.S. 325, 334-335.

Courts are hesitant and cautious in applying the judicial immunity doctrine to areas outside the traditional adversarial process, such as to quasi-judicial acts. See *Malley v. Briggs*, 106 S. Ct. 1092, 1096-1098. In order for quasi-judicial officials to be granted absolute judicial immunity, their acts must reflect the essence of judicial decision-making and involve discretion of a judicial nature. See *id.* at 1097; *Imbler v. Pachtman*, 424 U.S. 409; *Clark v. Washington*, 366 F.2d 678 (9th Cir. 1966). Accordingly, only in the most extraordinary cases are executives shielded from damages liability. See *Cleavinger v. Saxner*, 106 S. Ct. 496, 501 (citing favorably *Saxner v. Benson*, 727 F.2d at 669, 674 n.2 (Cudahy, J., concurring)). We must be equally hesitant in applying the doctrine to judges acting outside the traditional dispute resolution function.

In *Stump v. Sparkman*, 435 U.S. 349, the Supreme Court set out a test for determining when judicial immunity applies. In that case the more traditional role of the judge was involved. Upon application of a mother, the judge signed an order permitting the sterilization of her 15-year old daughter without her knowledge. Years later when the girl discovered that she had been sterilized she sued the judge for his failure to follow rudimentary due process considerations. The Supreme Court held that judicial immunity would apply unless the judge was acting totally without jurisdiction or the act was non-judicial. *Id.* at 360. The Court defined "judicial act" as follows: (1) an act normally performed by a judge and (2) where the parties deal with the judge in his or her judicial capacity. *Id.* at 362. The "jurisdiction" language of the *Stump* test supports the rationale for restricting extensions of judicial immunity, for the concept of jurisdiction is peculiarly related to the power of the court to render decisions against the parties before it. But in this case a jurisdiction analysis is inappropriate because the discharge decision does not implicate the power of the court—only the authority of the judge to make such an employment decision. Since

the *Stump* test is in the disjunctive, we need to consider the non-judicial act part of the test.

II.

A.

Most court decisions interpreting judicial acts in the context of judges' hiring and firing decisions have not extended judicial immunity protection. Those cases have uniformly held that such decisions are not "judicial" in nature and thus do not further the doctrine's objective of protecting judicial decisionmaking freedom. The defendant argues that because the selection of court reporters is made exclusively by judges, it meets the first prong of the *Stump* test and because court reporters assist judges in carrying out their official duties the second prong is also met. We find these arguments unpersuasive after a review of other judicial immunity decisions.

The defendant cannot find real support for his contention that his act is protected in *Blackwell v. Cook*, 570 F. Supp. 474 (N.D. Ind. 1983), In *Blackwell*, Judge Sharp held that the defendant judge's act of firing a probation officer was a judicial act, thus warranting immunity. The same Indiana statute was involved as here. The *Blackwell* court focused on the close working relationship between the probation officer and the defendant judge, finding that the duties of the probation officer were "inextricably bound up with the very functioning of the court itself." *Id.* at 478. Here there was no such relationship. Moreover, the act of firing by Judge Svetanoff in no way implicated the judge's decisionmaking ability.[1]

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[1] *Blackwell's* relationship and duty analysis seems especially suited to the line of patronage cases. In *Elrod v. Burns*, 427 U.S. 347, and *Branti v. Finkel*, 445 U.S. 507, the Supreme Court recognized an exception to the First Amendment prohibition against politically motivated patronage discharges. The exception permits policymaking and confidential government employees to be terminated

(Footnote continued on following page)

A subsequent Northern District of Indiana case criticizes the part of the *Blackwell* decision on which defendant relies. In *Lakowski v. Mears*, 600 F. Supp. 1568 (N.D. Ind. 1985), probation officers claimed civil rights violations against a judge for discharge based on age and political affiliation. Judge Moody denied the defendant's summary judgment motion based on absolute judicial immunity. In so doing, Judge Moody explicitly refused to follow the *Blackwell* result. *Id.* at 1574. After noting that the protections of judicial immunity are not for the benefit of a malicious or discriminating judge but rather for the benefit of the public and that the doctrine should be limited to its central purpose, the court held that a determination of whether their relationship implicates the judge's independence was needed, so that summary judgment was improper. *Id.*; see *Forrester v. White*, No. 84-1823 (7th Cir. June 5, 1986); *Pruitt v. Kimbrough*, 536 F. Supp. 764 (N.D. Ind. 1982), affirmed memoranda, 705 F.2d 462 (7th Cir. 1983); see also *Ex parte Virginia*, 100 U.S. 339 (application of judicial immunity depends on the character of the act).

This circuit has recently considered whether a judge should be immune from suit for firing a probation officer. *Forrester v. White*, No. 84-1823 (7th Cir. June 5, 1986). We granted immunity to the judge by reasoning that because the probation officer advised the judge on substantive decisionmaking, the judge's own discretion was suf-

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[1] *continued*
solely on the basis of their political beliefs. The rationale is that elected officials must have the loyalty of their policy-making officials with whom they work closely in order to carry out the political agenda upon which they were elected. Thus in such cases it is necessary to examine the relationship between the defendant and plaintiff to determine whether it is close and confidential and also the plaintiff's duties to determine whether they are policy-making. See *Meeks v. Grimes*, 779 F.2d 417, 423 (7th Cir. 1985) (bailiff in judge's chambers exempt from First Amendment protection because relationships within chambers must be based on loyalty and rapport). But this protection is limited to First Amendment violations; it is not an absolute immunity against allegations of racial discriminatory discharges.

ficiently at risk to fall within the doctrine's purpose. *Id.* at 20-21. *Forrester* goes beyond *Blackwell* by emphasizing the effect of firing on the judge's ability to render decisions. Because court reporters are not similarly situated such analysis is not dispositive of this case.

Other district court decisions support no immunity when a judge discharges a court reporter. In *Shore v. Howard*, 414 F. Supp. 379 (N.D. Tex. 1976), the court reasoned that when the "initiative and independence of the judiciary is not effectively impaired," the doctrine of judicial immunity does not apply.[2] Accord *Clark v. Campbell*, 514 F. Supp. 1300 (W.D. Ark. 1981) (judge's duties in hiring and firing county employees were clearly administrative; the judge was not engaged in a judicial function); *Cronvich v. Dunn*, 573 F. Supp. 1340 (E.D. Mich. 1983).

Similarly, in *Lewis v. Blackburn*, 555 F. Supp. 713, 723 (W.D.N.C. 1983), reversed on other grounds, 759 F.2d 1171 (4th Cir. 1985), certiorari denied, 106 S. Ct. 228, a magistrate sued a court clerk and judge for failing to reappoint her in violation of the First Amendment. The court held that because the power to select magistrates is one that could easily be exercised by others, it is not one "normally performed by a judge" and thus fails the *Stump* test.

A juvenile court staff attorney applicant sued the county judge for failure to hire in *Marafino v. St. Louis County Circuit Court*, 537 F. Supp. 206 (E.D. Mo. 1982), affirmed on other grounds, 707 F.2d 1005 (8th Cir. 1983). Juvenile staff attorneys' duties included representing and advising juvenile officers, filing petitions, appearing in court, and counseling the judge of the juvenile court. The district court held that she was not dealing with the judge in his judicial capacity during the administrative hiring process, although in her job as staff attorney she would deal close-

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[2] We realize that the holding in *Shore v. Howard* conflicts with *Forrester*, but the *Shore* rationale is proper insofar as it recognizes that acts which effect the judge's independent decisionmaking are shielded by judicial immunity.

ly with the judge in his official capacity. The hiring decision was not a judicial act; therefore judicial immunity was not extended to the defendant.

The defendant also points to *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), certiorari denied *sub nom. Rheuark v. Dallas County*, 450 U.S. 931, which held that a judge's supervision of court reporters was a judicial function. *Rheuark* is not contrary to our holding that Judge Svetanoff is not immune. In *Rheuark*, three prisoners brought a § 1983 action alleging that their due process rights had been violated because of a long delay in processing transcripts for appeal. The plaintiffs sued the trial judge for his failure to hire a sufficient number of court reporters. Relying on the *Stump* test to grant immunity, the Fifth Circuit concluded that (a) a judge normally supervises a court reporter's preparation of a transcript and (b) the plaintiffs dealt with the judge in his judicial capacity when they requested that he order the reporter to prepare the materials. *Id.* at 305. Unlike the case at bar, this was not a hiring or firing case, rather it involved traditional adversarial proceedings and an attempt to hold a judge liable for discretionary actions within those proceedings.

B.

In situations outside the traditional judicial decisionmaking arena but not involving personnel decisions, courts, including the Supreme Court, have been hesitant in extending absolute immunity to judges. For example, in *Ex parte Virginia*, 100 U.S. 339, the Supreme Court declined to extend immunity to a judge who was criminally prosecuted for his actions in selecting jurors. The Court determined that whether the act was judicial depends on the character of the act and not the character of the actor. *Id.* at 342. Because the selection of jurors could as easily have been committed to a private person as a judge, the act was not "judicial." *Id.* at 343. Likewise, in *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970), a member of a "fiscal court" sued the presiding officer, a judge, for forci-

bly removing him from a meeting and jailing him. The Sixth Circuit found that the fiscal court was administrative and legislative in function (managing the affairs of the county) and therefore the judge's duties were not judicial. No immunity was given. In *Richardson v. Koshiba*, 693 F.2d 911 (9th Cir. 1982), a commission of judges sought judicial immunity for its acts in recommending candidates for judicial office. The Ninth Circuit balked, stating that officials were entitled to the protections of absolute immunity because of the special nature of their responsibilities rather than their positions within the government. *Id.* at 914. Thus when a court official acts in a capacity not requiring the exercise of judicial discretion, he or she is not entitled to judicial immunity. In so holding the court distinguished *Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966), which had granted judicial immunity to a state bar association grievance committee. The court noted that the committee was given immunity because of the nature of its inherent judicial function in prosecuting and adjudicating claims of professional misconduct. The *Richardson* court noted that a balance existed between the need to protect citizens from constitutional violations and the need to protect officials in the performance of their duties. The commission, though made up of judges, performed a purely executive function and therefore was not entitled to judicial immunity. 693 F.2d at 914-915.

Finally, in *Doe v. City of Lake*, 399 F. Supp. 553 (N.D. Ind. 1975), judges were sued as to the adequacy of juvenile detention centers and the treatment given to juveniles. Judge Sharp (author of *Blackwell*) held that application of the doctrine of judicial immunity is to be restricted to its single objective—protecting "judicial freedom in the delicate process of deciding civil and criminal matters on their merits." *Id.* at 556. Thus immunity only applies when judicial matters rather than ministerial or administrative duties, are involved. On the facts of *City of Lake*, Judge Sharp reasoned that general responsibility for the administration of the court would not affect the judicial discretion required by the judges in making case-by-case decisions.

C.

The Supreme Court has expressed its reluctance to grant absolute immunity to quasi-judicial officers. Recently, in *Cleavinger v. Saxner*, 106 S. Ct. 496, members of a federal prison discipline committee (who hear cases of inmate infractions of institutional rules) were given only qualified immunity from civil rights suits. The Court noted that absolute judicial immunity has been extended to certain individuals performing functions closely associated with the judicial process. *Id.* at 500-501 (citing *Butz v. Economou*, 438 U.S. 478, 513 (administrative law judge); *Yaselli v. Goff*, 275 U.S. 503 (prosecutors); *Imbler v. Pachtman*, 424 U.S. 409, 424-426 (prosecutors); *Briscoe v. LaHue*, 460 U.S. 325, 335 (witnesses)). But where officals seek absolute exemption from personal liability for unconstitutional conduct, they "bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 501 (quoting *Butz*, 438 U.S. at 506). The application of immunity is based on function, the nature of the responsibilities and acts. Because (1) the prison discipline function is not a "classic" adjudicatory one; (2) the members of the prison disciplinary committee are not independent, neutral or detached; and (3) the lack of procedural safeguards, the committee does not present the "rare and exceptional circumstances warranting the application of judicial immunity." *Id.* at 502-504.

Similarly, in *Malley v. Briggs*, 106 S. Ct. 1092, the Supreme Court refused to extend absolute immunity to state police officers who prepared complaints and affidavits in order to obtain arrest warrants. The Court held that a police officer applying for a warrant was too far removed from the judicial phase of criminal proceedings to warrant judicial immunity. *Id.* at 1097. In so holding, the Court additionally noted that a prosecutor is required to adhere to the organized bar's professional standards, whereas for police officers there is no comparably well developed mechanism for controlling police misconduct. *Id.* at 1097 n.5.

The consensus of these cases is that judicial immunity should not be extended lightly or only because the actor is a judge. Before a judge is granted immunity, courts should examine the acts complained of to determine whether they are "judicial." *Lojuk v. Johnson*, 770 F.2d 619, 622 (7th Cir. 1985), certiorari denied, 106 S. Ct. 822. If the acts do not involve the judicial process so that a fear exists that freedom of judicial decisonmaking may be stifled, the judge should not be free from suit.

III

The question before us is whether the act of firing a court reporter implicates the judicial decisionmaking process. In this case the answer is a resounding no. Hiring and firing of employees is typically an administrative task. It involves decisions of a personal rather than impartial nature, which is integral to judicial decisionmaking. The decision to fire the plaintiff did not involve judicial discretion; in other words, the judge did not utilize his education, training, and experience in the law to decide whether or not to retain plaintiff. The administrative act of firing the plaintiff will not assist the judge in interpreting the law or exercising judicial discretion in the resolution of disputes. Certainly the court reporter assists the judge in his or her official capacity, but so does everyone else employed within the judge's chambers—the secretary, bailiff, law clerk, court reporter, probation officer, clerk of court, janitor—they all assist in the smooth operation of the judicial process. That, however, does not entitle a judge to absolute immunity in all employment-related decisions. Providing judicial immunity in employment actions alleging civil rights violations will not further the objective of the doctrine. The judge will not be more inhibited in rendering decisions because he may be called to task for firing a court reporter. Shielding judges from personal liability in their hiring and firing decisions cannot outweigh the need to protect the constitutional rights of public employees. Unlike situations more closely aligned with the judicial process, there is no other adequate means of re-

view for a judge's possible constitutional violations. A litigant who has not received appropriate due process may appeal the case to a higher court for review, whereas normally the only means an at-will employee has to question and correct the motives of a judge's employment decision-making is a civil rights suit. The absence of adequate procedural protections was emphasized in *Malley*, 106 S. Ct. at 1097 n.5, *Cleavinger*, 106 S. Ct. at 504, *Butz*, 438 U.S. at 512-513, and *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2814.

Because allowing judges to hire and fire court reporters with impunity will not further the objectives of the judicial immunity doctrine—principled decisionmaking—we decline to extend it to a judge's decision to terminate a court reporter. Therefore the district court's denial of defendant's motion for partial summary judgment is affirmed.[3]

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[3] We do not discuss qualified immunity because that doctrine was not raised. However, it is interesting to note that qualified immunity was rejected by the Eighth Circuit in *Goodwin v. Circuit Court of St. Louis County*, 729 F.2d 541, 545-546 (8th Cir. 1984), where the court held that because intentional discrimination was necessary for liability under § 1983, it was illogical to argue "good faith" for purposes of qualified immunity. But cf. *Rodriguez v. Board of Education*, 620 F.2d 362 (2d Cir. 1980).

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TEXT OF THE ORDER OF THE DISTRICT COURT OF MARCH 4, 1985

ORDER

This Motion is before the court on all defendants' motions for partial summary judgment on plaintiff's claim for compensatory and punitive damages. The court, being duly advised now finds as follows.

There is no genuine issue of material fact as to defendant Danikolas' noninvolvement in plaintiff's termination. Nor is there any dispute about the fact that the defendant Thirty-First Judicial District of Indiana does not have the legal or statutory capacity to terminate plaintiff. Accordingly, as to those two defendants, plaintiff's claim based on an unlawful termination must fail. Thus the case against defendants, Danikolas and Thirty-First Judicial District of Indiana, must be dismissed pursuant to FED. R. CIV. 12(b)(6).

The Court finds, however, that defendant Svetanoff's Motion for Partial Summary Judgment should be denied.

IT IS THEREFORE ORDERED that defendant Svetanoff's Motion for Partial Summary Judgment is DENIED.

IT IS FURTHER ORDERED that this cause of action is DISMISSED as against defendant Danikolas and defendant Thirty-First Judicial District of Indiana pursuant to FED. R. CIV. P. 12(b)(6).

ENTER: March 4, 1985.

[s] Michael S. Kanne, Judge
United States District Court

TEXT OF 42 U.S.C. §1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give

evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to other.

TEXT OF 42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

TEXT OF 42 U.S.C. §2000e(f)

The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the constitutional and legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

Supreme Court, U.S.
FILED
OCT 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 86-384

GERALD SVETANOFF,

Petitioner,

vs.

HARRIET L. McMILLIAN,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN O. MOSS
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(317) 635-1945

Counsel for Respondent

IN THE

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OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit appears as, McMillian v. Svetanoff, 793 F. 2d 149 (7th Cir. 1986). This opinion has been reproduced and is included in Appendix 1 of Petition For Certiorari.

JURISDICTION

The Petitioner invoked this Court's jurisdiction under the provisions of 28 U.S.C. §1254(1). The Respondent's Brief in Opposition to the Writ is submitted under the authority of Rule 24(1) of the Rules of the Supreme Court.

STATUTES INVOLVED

The federal statutes and constitutional provisions here involved are 42 U.S.C. §1981, 1983 and the First Amendment to the Constitution of the United States.

42 U.S.C. §1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

42 U.S.C. §1983

"Every person who, under color of any statute, ordinance, regulation, custom or usage of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other persons within the jurisdiction thereof to the deprivations of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit is equity, or other proper proceeding for redress."

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

QUESTION PRESENTED

Whether a State Court Judge may invoke the protection of the doctrine of absolute judicial immunity, when he terminates the employment of a Court Reporter and in so doing, allegedly violates that employee's Constitutional and statutory rights.

STATEMENT OF THE CASE

Respondent, Harriett McMillian, a black female, was employed as a Court Reporter for Lake County Superior Court from February, 1973 to July 1, 1981. When the Petitioner Svetanoff was elected and took office as judge, he summarily terminated her employment. The Respondent filed suit in Federal District Court under 42 U.S.C. §§1981 and 1983, and the First Amendment to the Constitution of the United States, seeking both monetary and equitable relief. On June 10, 1983, the Petitioner filed his Motion for Partial Summary Judgment as to the damage claims, alleging that his conduct was protected by the doctrine of absolute judicial immunity. The District Court on March 4, 1985 rejected the Petitioner's asserted claim of absolute immunity and denied his Motion for Partial Summary Judgment. Petitioner then appealed to the United States Court of Appeals for the Seventh Circuit which affirmed the District Court's ruling denying Petitioner's Motion for Partial

Summary Judgment. It is the Court of Appeals' order, affirming the judgment of the District Court that forms the basis for the Petitioner's instant Petition For Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Petitioner's act of terminating the Respondent's employment was administrative in nature, not a judicial function and therefore, the instant Petitioner may not now shield himself against liability behind the doctrine of absolute judicial immunity.

ARGUMENT

The Petitioner's Petition for Writ of Certiorari should be denied because the Petitioner has not presented any real issue to this Court for review. To the contrary, the Petitioner seeks here to have the Court redefine, again, what acts, or conduct constitute a "judicial act" such as to be entitled to the protection against liability offered by the doctrine of judicial immunity. Both the District Court and the Seventh Circuit Court of Appeals in the instant case each considered the proper question or issue as not whether the instant judge acted within his statutory authority when he fired the Respondent, but rather, whether that act or decision was made in the Petitioner's judicial capacity. Both courts below, relying on established and ruling Supreme Court precedent resolved the issue with no difficulty and held that this act of terminating this employee was not a judicial act.

Judges wear at least two hats, i.e., judges have both judicial and executive (or administrative) functions. Hiring and firing subordinates are executive, administrative functions. This basic distinction is a well settled principle of law. Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. (1978), Lopez v. Vander-

water, 620 F. 2d 1229, (7th Cir. 1980), Harris v. Deneaux, 776 F. 2d 942 (11th Cir. 1985), Holloway v. Walker, 765 F. 2d 517 (5th 1985), note, WHAT CONSTITUTES A JUDICIAL ACT FOR PURPOSES OF JUDICIAL IMMUNITY? 53 Fordham L. Rev. 1503.

Carried to its logical extreme, the instant petition would attach absolute immunity to any decision made by a judge within the scope of his lawful authority. Whether an act is "judicial" depends on the character of the act.

This Court in Stump v. Sparkman, 435 U.S. 349, 98 S.Ct. 1099 (1978) provided specific guidelines to be used by the lower courts when confounded with the issue or what conduct constitutes a judicial act for the purposes of judicial immunity.

Specifically:

1. The precise act complained of . . . is it a normal judicial function?

2. The events involved, did they occur in the judge's chambers or in open court?

3. Does the controversy center around a case then pending before the judge?

4. Did the controversy arise directly and immediately out of a visit to the judge in his judicial capacity. Stump, Supra, 98 S.Ct. at 1107.

In the instant case, applying the Stump factors, above, reveal unerringly that the conduct complained of here was administrative and not judicial.

A brief analysis of this Court's opinion in the case of Pierson v. Ray, 386 U.S. 553, 87 S.Ct. 1213, reveals yet another clear reason why the doctrine of absolute judicial immunity could not, and should not have been invoked in the instant case. In Pierson, this Court held that aggrieved parties had an avenue of recourse, i.e., appeal, without suing the judge. This Court held that should a judge err through inadvertence or otherwise, a party's remedy is through the appellate process, Pierson, 386 U.S. at 554, 87 S.Ct. at 1217-18.

The facts of the instant case clearly establish that the Petitioner's conduct complained of was not a "judicial" act subject to review by any appellate tribunal. Query, to what appeals court could the Respondent request and obtain review of the Petitioner's purely administrative act of terminating her employment? The answer, most simply stated, is none.

CONCLUSION

This Court should deny the Petitioner's Writ of Certiorari because:

1. The Petitioner's conduct terminating the employment of the Respondent was not a judicial act entitled to the protection of the doctrine of absolute judicial immunity.

2. This Court, in Stump v. Sparkman, 435 U.S. 349 and its progeny has defined judicial acts and has given the lower courts a workable viable guideline in deciding the issue of what acts constitutes judicial conduct.

3. The Respondent's federal and constitutional rights are at issue and if given immunity the Petitioner will be able to violate the Respondent's rights with impunity and immunity so as to render said federal rights a nullity.

The decision of the Seventh Court of Appeals need not be reviewed as it represents a correct and accurate statement of the law.

Respectfully submitted,

John O. Moss, Attorney for
the Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Attorney General of Indiana, LINLEY E. PEARSON, State House, Room 219, Indianapolis, IN 46204, by mailing same this 24th day of October, 1986, by U.S. First Class Mail, postage prepaid.

John O. Moss